NO. 42141-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

(CLARK County Cause No. 08-2-08862-0)

SUMMER V. RICHARDS, as duly appointed personal representative of the estate of BRIAN W. RICHARDS; SUMMER V. RICHARDS, individually; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of BRAEDEN F. RICHARDS, DOB 2-9-2002; SUMMER V. RICHARDS as duly appointed guardian of the estate and person of LAELA L. RICHARDS, DOB 9-16-2004; and SUMMER V. RICHARDS as duly appointed guardian of the estate and person of CHENAYA R. RICHARDS, DOB 5-11-2006,

Appellant,

vs.

AMERICAN MEDICAL RESPONSE NORTHWEST, INC., a foreign corporation doing business in Washington; SCOTT SQUIRES; and LEWIS FOX,

Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION & SUMMARY OF ARGUMENT

Summer Richards brought this lawsuit after the cardiac-related death of her 32-year-old husband, Brian, who would have survived had the Respondent paramedics taken him to the hospital the morning before his death. After a trial in which several of the trial court's legal and evidentiary errors prejudiced Ms. Richards, she appealed. In her Opening Brief, Ms. Richards explained that these errors included 1) the trial court's failure to appropriately sanction the egregious discovery conduct of Respondent American Medical Response ("AMR"), as well as 2) its dismissal of her claim of negligent retention and supervision against AMR. Ms. Richards also thoroughly explained why the trial court erred when it 3) excluded the prior conviction of a key defense witness, 4) gave Jury Instruction 16, and 5) denied her motion for a new trial.

In answer, Respondents devote extensive energy to an attempt to deprive Ms. Richards of her right to appellate review, claiming that Ms. Richards failed to preserve two of these issues for appeal. These arguments fail, as each of these errors is properly before this Court.

Putting these arguments aside, Respondents' various arguments against reversal are also wrong. As Ms. Richards demonstrates in her Opening Brief and below, the law compels reversal and remand for default against AMR for its discovery conduct (or, at the least, a new trial against

the company for its negligent retention and supervision of its paramedic employees), and a new trial against all Respondents with appropriate evidentiary and instructional rulings.

II. ARGUMENT

A. The trial court erred when it failed to default AMR as a discovery sanction, and that error is properly before this Court

Respondents (collectively "AMR") are mistaken that Ms. Richards has not preserved for appeal the trial court's refusal to default AMR for its abusive discovery conduct. To the contrary, that ruling is properly before this Court. Upon review, this Court should reverse, as the trial court's failure to impose a severe sanction prejudiced Ms. Richards and rewarded AMR for its egregious discovery conduct.

1. Ms. Richards perfected her appeal

AMR's attempt to deprive Ms. Richards of her right to appellate review fails, as a) Ms. Richards filed a timely appeal from the judgment that brings up all of the trial court's decisions for review, b) she was not required to lodge a formal objection after the trial court ruled against her, and neither c) "estoppel by judgment" nor d) RAP 2.5 bar this appeal.

a. Ms. Richards designated the correct judgment in her Notice of Appeal

Without citation to authority, AMR argues that Ms. Richards failed to perfect her appeal because she designated the final judgment in her

Notice of Appeal, rather than the attorneys' fees judgment dated April 15, 2011. But Ms. Richards is satisfied with the attorneys' fees award and has no wish to challenge it. The decision Ms. Richards does challenge – the denial of default or a similar severe sanction – was an interlocutory ruling that Ms. Richards could not have appealed until after final judgment. *See* RAP 5.2(a); *see also State v. Dailey,* 93 Wn.2d 454, 458-459, 610 P.2d 357 (1980) (a trial court's oral rulings are not final until "formally incorporated into findings of fact, conclusions of law, and judgment").

Appealing from that final judgment "brings up for review all the usual decisions made in the course of trial" provided those decisions had a prejudicial effect on the final order. RAP 2.4(b); *see also* Tegland, 2A Wash. Prac., *Rules Practice RAP 2.4* (7th ed. 2011); *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 134, 750 P.2d 1257 (1988), *clarified on denial of reconsideration at* 756 P.2d 142 (1988) (trial court's order granting motion for mistrial was reviewable upon appeal from judgment on new trial, because the second trial would not have happened absent the court's decision finding a mistrial). Here, as in *Adkins*, the trial court's decision to deny default "prejudicially affected" the final judgment, as a trial to determine AMR's liability would never have gone forward had the trial court granted Ms. Richards' motion. Because all rulings that materially affected the final judgment are preserved by designating the

final judgment on appeal, Ms. Richards' appeal from that ruling is properly before this Court. *See also Behavioral Sciences Institute v. Great-West Life*, 84 Wn. App. 863, 870, 930 P.2d 933 (1997).

b. Ms. Richards was not required to lodge an additional formal objection after the trial court denied default

AMR's other arguments also fail. First, Ms. Richards did not have to make a formal objection after the trial court denied her motion for default. Washington's Civil Rules have eliminated the necessity, in most circumstances, of objecting to trial court orders. CR 46; *see also State v. Hamilton*, 24 Wn. App. 927, 935, 604 P.2d 1008 (1979) (where trial court was aware of the State's arguments supporting a discovery motion, State was not required to formally object to the trial court's denial of that motion to preserve the issue for appeal). The trial court entertained lengthy briefs and oral argument on Ms. Richards' sanction request, sought supplemental briefing, and held oral argument before trial. CP 471, 510, 744, 823, 1399; AT 81-119, 193-195; RP 25:22-26:14. The civil rules do not – and should not – require Ms. Richards to make a futile objection after extensive argument in which she made her objection plain.

c. "Estoppel by judgment" is inapplicable

Because Ms. Richards designated the correct judgment, "estoppel" does not prevent her from pursuing this claim on appeal. Indeed,

"estoppel by judgment" has nothing to do with appeals. As this Court has explained, estoppel by judgment and *res judicata* preclude *relitigation* of claims or issues that were resolved or should have been resolved in previous proceedings. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 327-334, 941 P.2d 1108 (1997). In contrast, appeal from a final judgment is a matter of right, and does not negate the claim preclusion effect of a judgment (unless, of course, the appellate court reverses the lower court decision). RAP 6.1; *see also Nielson v. Spanaway General Med. Clinic, Inc.*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998) (citations omitted).[1] Estoppel by judgment is inapplicable in this context.

d. RAP 2.5(b)(1) does not bar Ms. Richards' appeal

RAP 2.5(b)(1) also does not preclude Ms. Richards from appealing the sanctions ruling, because she fits precisely within the circumstances that permit a party to "accept the benefits of a trial court decision" and still pursue an appeal. RAP 2.5(b)(1)(iii); *see also Scott v. Cascade Structures*, 100 Wn.2d 537, 541, 673 P.2d 179 (1983). In *Scott*, the Washington Supreme Court held that a decedent's personal representative could collect a damages award without losing her ability to appeal, where the only

[1] "Collateral estoppel" may prevent an appellant from arguing a contention opposite to one he made at trial; but that doctrine, too, is inapplicable here. *See, e.g., Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 258-9, 948 P.2d 858 (1997).

question on appeal was whether the award should have been higher.[2] Here, even had the trial court defaulted AMR, Ms. Richards was entitled to her costs and fees for her successful motions to compel. *See* CR 37(a)(4) (litigant is entitled to an award of fees and costs on a successful motion to compel, unless the trial court finds that opposition to the motion was "substantially justified or that other circumstances make an award of expenses unjust"). As in *Scott*, because the only question on appeal is whether the trial court should have granted the *additional* sanction of default, Ms. Richards is entitled to accept the benefits of the attorneys' fees judgment and is not precluded from appealing the trial court's failure to default AMR for its conduct. *See* RAP 2.5(b)(1)(iii).[3]

2. AMR's discovery conduct was willful and prejudicial, and warranted a harsh sanction such as default

In defending the trial court's failure to grant a meaningful sanction, AMR claims that Ms. Richards "invited error" because the trial court did

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[2] This holding was eventually codified in RAP 2.5(b)(1)(iii). K. Tegland, 2A Wash. Prac., *Rules Practice RAP 2.5*, § 22 (7th ed. 2011).

[3] Even if this Court were to accept AMR's claim that Ms. Richards should have designated the attorney's fees judgment in her Notice of Appeal, this Court should nonetheless conclude that she has not waived her right to appellate review of the sanctions ruling. The Rules of Appellate Procedure are liberally construed to "facilitate the decision of cases on the merits." *Behavioral Sciences Institute,* 84 Wn. App. at 870 (*citing* RAP 1.2(a) and *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995)). Indeed, "where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." *Olson*, 126 Wn.2d at 322-323. Here, AMR can claim neither prejudice nor legitimate confusion about the errors Ms. Richards assigned on appeal.

not weigh the factors required under *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 495-96, 933 P.2d 1036 (1997). *See* Answering Brief, p. 20. But AMR is wrong, because a trial court weighs those factors only to support a default sanction, not when it imposes lesser sanctions. *Blair v. TA-Seattle East No. 176*, 171 Wn.2d 342, 349, 254 P.3d 797 (2011) (citation omitted). Here, the trial court imposed such a lesser sanction, and its failure to do more cannot constitute a waiver of Ms. Richards' right to appeal that decision.

a. AMR's willful conduct warranted default as a sanction

In her Opening Brief, Ms. Richards thoroughly described AMR's deleterious discovery conduct. *See* Appellant's Opening Brief, pp. 14-18. To highlight some of AMR's most egregious failures, officials at AMR *denied the existence* of their internal investigation related to Brian Richards' death for fourteen months, and *never produced* the complete file. CP 155, 158, 208-9, 250, 479. In addition, the discovery that did occur *strongly suggests that AMR remains in possession of additional relevant, discoverable documents* that it has never produced. *See* Appellant's Opening Brief pp.14-16 (describing the testimony of AMR's systems administrator regarding AMR's failure to conduct a search for emails related to Brian Richards' death, and noting that AMR ultimately

produced only a fraction of emails one would expect had the company actually complied with the trial court's order to conduct a search).

AMR attempts to paint this and other conduct as mere inadequate production.[4] But the trial court's view of AMR's behavior demonstrates otherwise. The trial court questioned AMR harshly about its discovery failures and called the company's conduct "despicable." AT 97:9-98:6, 102:17-103:5. It was obvious to all that this was not a case where AMR made a good faith effort from the start to comply with its discovery obligations. *See, e.g.,* AT 15:15-23 (judge and AMR's trial counsel agree that they have "never understood" AMR's initial discovery objections); AT 106:12 (trial court stated inclination to view AMR's conduct as willful). Given AMR's ongoing and unexcused discovery failures, Ms. Richards provided ample evidence to meet the "willful" prong of the *Burnet* test.[5] *See Rivers v. Wash. State Conference of Mason Contractors,* 145 Wn.2d 674, 686-87, 41 P.3d 1175 (2002).

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[4] In fact, AMR's discovery abuses, detailed in Ms. Richards' Opening Brief, are not limited to the mere loss of a box of files - a claim awfully similar to the implausible flooded-basement excuse offered by the defendant in *Demelash v. Ross Stores*,105 Wn. App. 508, 518, 20 P.3d 447 (2001).

[5] Contrary to AMR's assertion (Answering Brief, p. 22), its failure to comply with discovery *obligations* included failure to comply with discovery *orders*, thus assuring the trial court's ability to impose sanctions pursuant to CR 37(b). For example, AMR produced a 30(b)(6) deponent as required by the trial court's December 3, 2010 order (CP 253), but as that deponent testified, AMR had not conducted the exhaustive search for emails required by that order. CP 252, 292, 295, 299.

b. A mere award of fees did not cure the prejudice to Ms. Richards, and thwarted the purpose of sanctions

As its conduct is indefensible – and is, therefore, "willful" as a matter of law – AMR devotes its *Burnet* analysis to a claim that Ms. Richards was not prejudiced. But AMR's conduct prejudiced Ms. Richards because the documents the company withheld – and have never completely produced – were directly relevant to Ms. Richards' claims. Without them, she could not adequately depose or cross-examine AMR's witnesses, and the trial court's authorizing Ms. Richards to re-depose those witnesses would have improperly resulted in a prejudicial delay of the trial. *See, e.g., Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984) *aff'd,* 104 Wn.2d 613, 708 P.2d 685 (1985).

The fact that Ms. Richards, on her own, obtained the three-page summary of AMR's internal investigation did not negate this prejudice, as she had only a summary of what turned out to be a voluminous file.[6] Not until just before trial did AMR produce additional material from that file, including emails and other documents that directly contradicted AMR's deponents. *See, e.g.,* CP 413 (email from AMR Manager Pontine Rosteck

[6] Ms. Richards anticipated AMR would raise this issue, and thus she thoroughly addressed it in her Opening Brief. *See* Appellant's Brief, pp.16-17. In addition to explaining why her possession of the 3-page summary did not absolve AMR of its discovery obligations, Ms. Richards reiterates that her counsel did nothing untoward by maintaining the confidentiality of a document he possessed through his own work product. The fact that the trial judge never again raised this concern nor relied on it in his ultimate ruling on the sanctions motion demonstrates that this issue is irrelevant.

to AMR General Manager David Fuller, in which Ms. Rosteck states that Squires' failure to perform a 12-lead EKG was a protocol violation). Ms. Richards' possession of a mere summary cannot excuse AMR's withholding an entire, relevant file for more than fourteen months, and its ultimate failure to produce the file in its entirety. *See, e.g., Gammon,* 38 Wn. App. 282 (reversing trial court's decision to impose only a fine for conduct virtually identical to AMR's discovery abuses)*; see also Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 576, 220 P.3d 191 (2010).

Finally, by imposing a minimal sanction, the trial court rewarded AMR for the very conduct that sanctions are meant to deter. *See, e.g., Magaña*, 167 Wn.2d at 584 (citing *Physicians Ins. Exchange v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993)) (sanctions should deter, punish, compensate, and educate); *Taylor v. Cessna Aircraft*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985); *Gammon*, 38 Wn. App. at 282. This Court should reverse, as the trial court abused its discretion in imposing inadequate sanctions for AMR's deleterious conduct.

B. The trial court improperly dismissed Ms. Richards' claims that AMR negligently retained and supervised Squires and Fox

In the absence of a default judgment, trial proceeded against AMR and the other Respondents, but the trial court dismissed Ms. Richards' claims of negligent retention and supervision at the close of her case. RP

1834:16-1835:18. This was error, both because the trial court made the same legal error AMR perpetuates here, and because Ms. Richards provided substantial evidence to support each element of these claims.

1. AMR had a duty to appropriately retain and supervise its paramedic employees

Ms. Richards provided substantial evidence of AMR's duty to adequately supervise and retain paramedics Scott Squires and Lewis Fox. AMR argues that Ms. Richards was required to provide expert testimony on this element of her claims, because such testimony may be required in corporate negligence cases. *See* Answering Brief, pp. 27-29. And AMR now picks up and carries forward the trial court's incorrect conclusion that its employees' union and state-certification status absolved AMR of the duty to appropriately retain and supervise its employees. *Id.* These theories are legally wrong; moreover, AMR's own witnesses provided substantial evidence of this duty.

a. Union status and state certification are irrelevant

No legal authority supports the proposition that union status and state certification mitigate an employer's duty to responsibly retain and supervise employees. In fact, Washington cases applying these doctrines to both public schools and hospitals demonstrate the opposite. *See, e.g., Scott v. Blanchet High School*, 50 Wn. App. 37, 44, 747 P.2d 1124 (1987);

Thompson v. Everett Clinic, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993); *Douglas v. Freeman*, 117 Wn.2d 242, 248, 814 P.2d 1160 (1991). To hold otherwise would create a special class of employers who, by virtue of the fact that they employ health care providers whose state certification requires the supervision of a physician, would be immune from claims of negligent retention and supervision. In essence, AMR is asking this Court to overrule prior law and grant it an immunity unique among employers.

Clark County's Medical Program Director ("MPD"), Dr. Lynn Wittwer, supervises the ongoing clinical education of the paramedics operating under his license, and had the power to complain to the Department of Health ("DOH") and to demote Squires from lead paramedic status pending the DOH investigation. RP 527:15-19, 1008:9-1009:9, 1032:17-1033:2 (noting that this was the first time in his career he had ever sent such a letter to DOH.) This is in keeping with his statutory responsibilities as these paramedics' supervising physician. *See* RCW 18.71.205. But Dr. Wittwer's clinical role does not extinguish AMR's supervisory responsibilities for the paramedics in its employ. *See, e.g.* RP 1314:11-1315:6 (AMR General Manager David Fuller testified he is responsible for firing and scheduling decisions). This arrangement between the MPD and AMR may be atypical of non-medical employers, but together Dr. Wittwer, his assistant Marc Muhr, and AMR General

Manager David Fuller fully explained it to the jury. RP 465:16-466:25, 471:9-18, 1006:2-1011:12, 1314:11-1315:6, 1333:13-1334:7. It was certainly not beyond the knowledge of a layperson to understand each entity's distinct responsibilities.

Similarly, the state had the authority to take action on Squires and Fox's certifications, but not to supervise their daily activities. As DOH investigator Gary Reed testified, his division was responsible for investigating complaints related to "about 60 some-odd different health care professions," including paramedics. RP 382:4-25. It would be impossible for DOH to assume the responsibility for the day-to-day management of paramedics throughout Washington State. Just as hospitals are in the best position to supervise and monitor the physicians that work in their facilities, AMR is the only corporate entity with daily, ongoing supervisory access to these employees. S*ee, e.g., Pedroza v. Bryant*, 101 Wn.2d 226, 232, 677 P.2d 166 (1984) (citation omitted).

Union status is equally irrelevant. Of course, as is typical with unionized workplaces, these paramedics' union had a contract with AMR that determined the procedures under which an employee is disciplined or fired. RP 541:21-542:11. But it is the union's role to represent the employees' interest, not to ensure that they provide good clinical care on the job. As Ms. Richards demonstrated, that responsibility lay with AMR.

b. Expert testimony is not required to establish AMR's duty and AMR itself provided that evidence

Generally, "expert testimony [in medical malpractice cases] is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson." *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (*citing* 5A K. Tegland, Wash. Prac., *Evidence* § 300 (1982)). Because the national and local standards of care hospitals must follow in hiring and supervising employees may be beyond the knowledge of a lay person, expert testimony *may* be required in Washington State in corporate negligence cases against hospitals. *See, e.g., Douglas v. Freeman*, 117 Wn.2d 242, 248-249, 814 P.2d 1160 (1991); *Ripley v. Lanzer*, 152 Wn. App. 296, 324, 215 P.3d 1020 (2009) (*citing Harris* at 449).[7] But expert testimony in ordinary negligence cases is not typically necessary, and even some cases involving professional conduct may not require such testimony. *See, e.g., Petersen v. State*, 100 Wn.2d 421, 437-438, 671 P.2d 230 (1983) (holding that lay testimony was sufficient to establish violation of psychiatrist's standard of care regarding disclosure of the dangerous propensities of his patient).

[7] *Johnson v. Misericordia Community Hospital*, 99 Wis.2d 708, 301 N.W.2d 156 (1981), does not help AMR. The Washington Supreme Court, in citing that Wisconsin case in a list in *Pedroza v. Bryant*, did so only for the proposition that many jurisdictions have adopted the doctrine of hospital corporate negligence. *Pedroza*, 101 Wn.2d at 230.

Ms. Richards' negligent retention and supervision claims do not involve violation of standards of care beyond the understanding of a lay juror. Here, an ambulance company – that, in contrast with a hospital, provides a limited service to patients, and employs only paramedics and EMTs – testified to its sole authority to hire and fire Squires and Fox. RP 1314:23-1315:6, 1081:6-10. The company's internal protocols governed the behavior of the paramedics in its employ, and its quality assurance division worked in conjunction with Clark County's Medical Director to ensure that its paramedics provided good clinical care. RP 836:8-23.

For example, AMR manager Pontine Rosteck admitted that it was her job to train employees and ensure that AMR paramedics and EMTs provided quality care to patients. RP 834:8-837:3. When these employees violated protocols as well as other job expectations, it was AMR that took disciplinary action, including termination. *See* Appellant's Opening Brief, pp. 5-6. And it was AMR, and AMR alone, that scheduled these two problem employees to respond to emergency calls together. RP 1334:2-17. This testimony was more than sufficient to raise a jury question as to whether AMR bore a duty to appropriately retain and supervise the paramedics in its employ, and there was nothing so technical that a lay juror could not have determined whether this duty was breached. *See, e.g., Petersen*, 100 Wn.2d at 437-438.

2. Ms. Richards provided sufficient evidence to raise a jury question on each of the elements of these claims

The trial court's dismissal of these claims was also improper because Ms. Richards provided substantial evidence from which a reasonable juror could conclude that AMR negligently retained and supervised Squires and Fox. *See Schmidt v. Coogan,* 162 Wn.2d 488, 492-493, 173 P.3d 273 (2007) (judgment as a matter of law is error where a litigant has provided substantial evidence to support her claim, and where there is any "doubt as to the proper verdict"); *see also Brown v. Dahl*, 41 Wn. App. 565, 573, 705 P.2d 781 (1985). As explained above, AMR had a duty, and this evidence establishes AMR's *breach* of that duty because of its advance knowledge of Squires and Fox's repeat violations of protocol, including acts that endangered patient care. *See* Appellant's Opening Brief, pp. 5-6; *see also* RP 1025:15-10:30:13.[8]

Ms. Richards also provided ample testimony from which a reasonable juror could find that AMR's ongoing retention and failure to supervise Squires and Fox *proximately caused* Brian Richards' death. *See, e.g., Petersen*, 100 Wn.2d at 435-6. In *Petersen*, the Washington Supreme Court affirmed a trial court's decision to submit to the jury the question of

[8] While there was conflicting testimony from AMR employees and MPD staff about whether AMR had viewed Squires and Fox's prior conduct as potentially threatening to patients, (RP 1081:15-1082:9; 1087:25-1088:7; 1345:7-13), it was for the jury to weigh the credibility of these after-the-fact contradictions. *See, e.g., Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 256, 868 P.2d 882 (1994).

whether a psychiatrist's release of a psychiatric patient was the proximate cause of a car accident that led to a driver's injuries. *Id.* As the Court explained, proximate cause is a question "for the jury, and it is only when the facts are undisputed and the inferences therefrom are plain and incapable of reasonable doubt or difference of opinion that it may be a question of law for the court." *Id.* (*citing Mathers v. Stephens*, 22 Wn.2d 364, 370, 156 P.2d 227 (1945) (additional citations omitted).

Here, witnesses confirmed that Squires and Fox were at Brian Richards' home on the morning of his death because of their employment with AMR (RP 1335:20-22), and that while there, they acted outside of the scope of their authority by violating protocols and suggesting Brian try vinegar to treat heartburn. *See* Appellant's Opening Brief, p. 9. Ms. Richards also provided expert testimony linking these acts to Brian's death. RP 720:9-723:14, 731:7-19. Although the parties dispute these facts, their resolution was for the jury.[9]

Given this ample testimony, Ms. Richards more than met her burden to provide substantial evidence in support of her claim of negligent

[9] Proximate cause also requires legal causation: a legal determination that liability should extend to the conduct in question. *Petersen*, 100 Wn. 2d at 435; *Lynn v. Labor Ready*, 136 Wn. App. 295, 311-12, 151 P.3d 201 (2007). Legal causation exists here for the same reasons that Washington law recognizes corporate negligence for hospitals: because Squires and Fox were present at the Richards home by virtue of their role as paramedics, and AMR has a special relationship to patients and a greater ability than Dr. Wittwer or the state to oversee those paramedics. *See Pedroza*, 101 Wn.2d at 232.

retention: that AMR knew or should have known that these paramedics were unfit, and that its retention of them was a proximate cause of Brian Richards' death. *See Lynn v. Labor Ready*, 136 Wn. App. at 306-307 (*citing Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 148-49, 988 P.2d 1031 (1999) (citations omitted). She also met her burden on her claim of negligent supervision: that AMR knew or should have known that Squires and Fox's incompetence presented a risk of harm to patients; that Squires and Fox acted outside the scope of their employment by violating protocols and giving unlicensed medical advice; and that AMR's failure to supervise them was a proximate cause of Brian Richards' death. *See Peck v. Siau*, 65 Wn. App. 285, 294, 827 P.2d 1108 (1992). Viewing the evidence in the light most favorable to Ms. Richards, the trial court should have denied AMR's motion to dismiss and allowed the jury to consider these claims. *See Schmidt*, 162 Wn.2d at 492-493.

C. The trial court erred in excluding defense witness Travis Hardin's prior felony conviction

The jury should also have been informed of the prior felony conviction of key defense witness Travis Hardin. AMR analyzes this issue incorrectly when it contends that Ms. Richards did not meet her burden necessary for admission of this conviction. As the application of the mandatory *Alexis* factors shows, Ms. Richards met her burden to show

that Hardin's conviction was "slightly" more probative than prejudicial. ER 609(a); *State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997); *State v. Russell*, 104 Wn. App. 422, 436, 16 P.3d 664 (2001). The trial court committed harmful error by excluding it.

1. Weighing the *Alexis* factors is not optional

As the Washington Supreme Court has expressly stated, when exercising the discretion to admit or exclude a prior conviction under ER 609(a)(1), "[a] trial court must articulate, *for the record,* the factors which favor admission or exclusion of prior conviction evidence. . .[and t]he responsibility of the trial court to state the factors considered under the *Alexis* test for the record is *mandatory*." *State v. Rivers*, 129 Wn.2d 697, 705-6, 921 P.2d 495 (1996) (citations omitted) (emphases in original). By suggesting that this on-the-record weighing is optional, or only applies when a trial court admits a prior conviction, AMR ignores this crystal clear mandate. Because the trial court did not come close to fulfilling this mandate, it unequivocally abused its discretion. *See id.*

2. Those factors are part of the "probative" analysis

Had the trial court weighed the required factors, it would have necessarily considered the nature of the prior crime, the centrality of Hardin's testimony, and the impeachment value of the conviction. *See State v. Calegar*, 133 Wn.2d 718, 722, 947 P.2d 235 (1997) (*citing State v.*

Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980)) (reciting the six factors). As the Washington Supreme Court has explained, some of the *Alexis* factors are useful in assessing the probative value of the prior conviction. *State v. Hardy*, 133 Wn.2d 701, 709, 946 P.2d 1175 (1997). The three listed above are particularly critical in this case. Thus, AMR is wrong to suggest that Ms. Richards had to prove the probative value of Hardin's conviction without reference to these factors.

3. Ms. Richards met her burden to establish that Hardin's prior conviction was more probative than prejudicial

AMR baldly asserts that Ms. Richards "made no record below" to support a showing that Hardin's felony conviction was probative of his credibility. But Ms. Richards has never argued that Hardin's crime was automatically one of dishonesty – if it were, it would be admissible under ER 609(a)(2). Rather, Ms. Richards argued extensively that Hardin's conviction was probative of his veracity because commission of this particular crime involved viewing child pornography on the Internet, a necessarily clandestine activity, and because both AMR and the jury saw his testimony as a key tie-breaker between competing versions of events. CP 1265-69, 1350-52; RP 1363:10-1366:5.

Undoubtedly, the law disfavors the use of a prior felony to impeach a witness' credibility, when the crime was not one of dishonesty.

Hardy, 133 Wn.2d at 708. And, as Ms. Richards acknowledged in her Opening Brief, the fact that Hardin's crime involved viewing child pornography could increase the prejudicial nature of the conviction. *See, e.g., State v. Newton*, 109 Wn. 2d 69, 79, 743 P.2d 254 (1987).[10] For these reasons, if this were a case involving the admission of the prior conviction of a criminal defendant, or, if Hardin's testimony had not been so central to AMR's defense, or even if Hardin had appeared in person at trial, the trial court's decision may have been less harmful.

But in this case, where Hardin did not testify in person and instead a clean-cut defense attorney read the testimony, (RP 1726:13-1759:24), where the jury believed him to be a trusted emergency responder (RP 2474:7-22), where he was not on trial, and where his testimony was central to AMR's defense (*id.*), the trial court's error was not harmless because exclusion of this conviction very likely determined the verdict. *See, e.g., Calegar*, 133 Wn. 2d at 729. If ER 609(a)(1) has any meaning, this is the case where it applies.

D. The trial court erred in including Instruction 16 and that error is properly before this Court for appellate review

[10] AMR also posits a *per se* prohibition on admission of prior felony convictions that involve possession of illicit materials, citing *State v. Calegar*, 133 Wn.2d at 723, 727. *See* Answering Brief at 34. What the Washington Supreme Court actually said in *Calegar* is that it is improper for a trial court to make a conclusory determination that drug-related felonies are always crimes of dishonesty. *Calegar* at 727-729. This is a vastly different proposition than the one AMR urges here, and does not support its claim.

The trial court similarly abused its discretion by including Jury Instruction 16. This Court should reject AMR's attempt to deny Ms. Richards appellate review, as the record reflects her specific objections. Ms. Richards urges reversal and remand for a new trial, because the trial court committed prejudicial error when it gave this instruction.

1. Ms. Richards made timely objections to Instruction 16

AMR's resort to a claim that Ms. Richards did not preserve her objection illustrates the dangers of off-the-record discussions. As AMR is well aware, the judge and all the parties agreed to review proposed jury instructions off the record, with an opportunity to record objections after the jury's deliberations had begun. RP 2330:9-12, 2344:17-2345:2. During the three-hour unrecorded discussion, Ms. Richards objected to Instruction 16 on the basis that it was confusing, misleading, and excluded a portion of the statute necessary to one of her theories of her case. CP 1392-4. But now, AMR seeks to use that agreed-upon process as a sword to prevent Ms. Richards' appeal.

This is improper, because the record shows that Ms. Richards objected and the trial court understood it. This is so regardless of the fact that she did not reiterate those objections shortly before closing argument, when the trial court asked counsel whether they could argue their theories of the case. *See* RP 2373:1-10). Ms. Richards had already objected to

Instruction 16 and described the bases for those objections during the off-the-record colloquy that occurred the night before.[11] The only logical conclusion that can be drawn from this discussion was that Ms. Richards would proceed to closing and use the instructions as given to argue her case, subject to her previous objections and those she would raise after the jury deliberated.[12] Where it is apparent that an unrecorded discussion took place, and where the trial court understood the objection, the purpose of CR 51(f) is served and this Court should consider this issue as it would be unfair not to do so. *See, e.g., Wickswat v. Safeco Ins. Co.*, 78 Wn. App. 958, 967-68, 904 P.2d 767 (1995); *but see Micro Enhancement Int'l Inc. v. Coopers & Lybrand*, 110 Wn. App. 412, 429, 40 P.3d 1206 (2002).

2. The trial court erred by including Instruction 16

As Ms. Richards demonstrated in her opening brief, the trial court committed prejudicial error when it included Instruction 16. *See* Appellant's Opening Brief, pp. 44-50. AMR's claims to the contrary fail. First, the instruction was not necessary for AMR to argue its theory of the

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[11] AMR now disagrees as to the nature of Ms. Richards' objections, but it has never denied that she in fact objected at that time, has never filed a counter declaration, and has never offered a reason to doubt this statement signed under penalty of perjury.

[12] As Ms. Richards has explained, one of her theories of liability was negligent retention and supervision, but she was unable to pursue it because of the trial court's dismissal of that claim. AMR has never claimed that counsel's colloquy with the trial court about whether she could argue her theory of the case resulted in the waiver of her right to challenge that ruling. This is further confirmation that Ms. Richards' right to challenge the trial court's giving of Instruction 16 is properly before this Court.

case, because the rest of the instructions incorporated qualified immunity, and by adding Instruction 16, the trial court doubled the emphasis on that defense. *See, e.g., Brown v. Dahl,* 41 Wn. App. at 579-80.[13] Second, the statutory language was confusing even to attorneys, (*see* CP 1393-4) and the jury's question to the court demonstrated that the jurors did not understand its application to the facts of this case. RP 2530:18-2542:15.

Third, Ms. Richards provided evidence to support her argument that the trial court should have included the portion of the statute that described the circumstances that abrogated immunity. *See* RP 763:8-19; 1260:7-1262:14 (Squires and Fox improperly diagnosed Brian with heartburn and recommended apple cider vinegar). AMR's claim that "there is no evidence that Mr. Richards suffered resultant harm from the [cider vinegar] advice" would be laughable if the outcome of this case were not so tragic. Brian Richards was convinced by these paramedics not to go to the hospital, and as a result, he died. The trial court should not have given Instruction 16 at all, but at the very least, it should have included the entire statute to ensure that Ms. Richards could argue all her

[13] The trial court incorrectly believed that AMR needed the instruction to argue its theory of the case. RP 2540:23-25. Thus, even if this Court were convinced by AMR's claims of waiver, this Court should reverse, to avoid the trial court's perpetuation of this error on remand. S*ee Falk v. Keene Corp.*, 113 Wn.2d 645, 982, 782 P.2d 974 (1989) (appellate court has inherent power to consider issues necessary to resolve appeal).

theories of her case.[14] *See, e.g., Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 77, 896 P.2d 682 (1995). In short, the trial court's decision to include Instruction 16 was erroneous, and because it prejudiced Ms. Richards, this Court should reverse. *See, e.g., Blaney* v. *Int'l Ass'n of Machinists and Aerospace Workers,* 151 Wn.2d 203, 211, 874 P.3d 757 (2004) ("[a]n erroneous instruction is presumed prejudicial unless it affirmatively appears that it was harmless").

III. CONCLUSION

Ms. Richards properly preserved her claimed errors for review, and respectfully requests that this Court reverse the trial court's sanctions ruling and remand for entry of default against AMR. In the event that a lesser sanction is imposed, Ms. Richards is entitled to a trial against AMR for negligent retention and supervision. Ms. Richards also respectfully requests that this Court reverse the trial court's other erroneous rulings and remand for a new trial against the other Respondents with the admission of Travis Hardin's felony conviction and the exclusion of Instruction 16.

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[14] Ms. Richards is not estopped from making this argument here. Judicial estoppel applies only when 1) a party takes a position "clearly inconsistent with its earlier position," 2) judicial acceptance of the later position would create an impression that either the first or second court was misled, and 3) the party asserting an "inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party." *Miller v. Campbell*, 164 Wn.2d 529, 539-40, 192 P.3d 352 (2008) (citations omitted). Not one of these factors applies here, as Ms. Richards argued this point to the trial court, has not misled either tribunal, and AMR is not disadvantaged.

DATED this 5th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I personally served the Reply Brief of Appellant on counsel for Appellant/Defendants by eservice from the Court of Appeals website, as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED at Seattle, Washington, this 5th day of March, 2012.

Mary Monschein

PETERSON WAMPOLD LAW OFFICE

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